THE

War Powers of the President,

AND THE

LEGISLATIVE POWERS OF CONGRESS

IN RELATION TO

Rebellion, Treason and Slavery.

By WILLIAM WHITING.

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PREFACE TO THE SECOND EDITION.

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WAR POWERS OF THE PRESIDENT, AND LEGISLATIVE POWERS OF CONGRESS, IN RELATION TO REBELLION, TREASON, AND SLAVERY.

The following pages were not originally intended for publication, but were written by the author for his private use. He has printed them at the request of a few friends, to whom the opinions therein expressed had been communicated; and he is not unaware of several errors of the press, and of some inaccuracies of expression, which, in one or two instances, at least, modify the sense of the statements intended to be made. The work having been printed, such errors can conveniently be corrected only in the "*errata*." This publication was principally written in the spring of 1862, the chapter on the operation of the Confiscation Act of July 17th, 1862, having been subsequently added. Since that time President Lincoln has issued his Emancipation Proclamation, and several military orders, operating in the Free States, under which questions have arisen of the gravest importance. The views of the author on these subjects have been expressed in several recent public addresses; and, if circumstances permit, these subjects may be discussed in a future addition to this pamphlet.

To prevent misunderstanding, the learned reader is requested to observe the distinction between emancipating or confiscating slaves, and abolishing the laws which sustain slavery in the Slave

States. The former merely takes away slaves from the possession and control of their masters; the latter deprives the inhabitants of those States of the lawful right of obtaining, by purchase or otherwise, or of holding slaves. Emancipation or confiscation operates only upon the slaves personally; but a law abolishing the right to hold slaves, in the Slave States, operates on all citizens residing there, and effects a change of local law. If all the horses now in Massachusetts were to be confiscated, or appropriated by government to public use, though this proceeding would change the legal title to these horses, it would not alter the laws of Massachusetts as to personal property; nor would it deprive our citizens of the legal right to purchase and use *other* horses.

The acts for confiscation or emancipation of enemy's slaves, and the President's Proclamation of the 22d of September, do not abolish slavery as a legal institution in the States; they act upon persons held as slaves; they alter no local laws in any of the States; they do not purport to render slavery unlawful; they merely seek to remove slaves from the control of rebel masters. If slavery shall cease by reason of the legal emancipation of slaves, it will be because slaves are removed; nevertheless, the laws that sanction slavery may remain in full force. The death of all the negroes on a plantation would result in a total loss to the owner of so much "property;" but that loss would not prevent the owner from buying other negroes, and holding them by slave laws. Death does not interfere with the local law of property. Emancipation and confiscation, in like manner, do not necessarily interfere with local law establishing slavery.

The right to liberate slaves, or to remove the condition or *status* of slavery, as it applies to all slaves living at any one time, or the right to abolish slavery in the sense of liberating all existing slaves, is widely different and distinct from the right of repealing or annulling the laws of States which sanction the holding of slaves. State slave laws may or may not be beyond the reach of the legislative powers of Congress; but if they are, that fact

would not determine the question as to the right to emancipate, liberate, or to change the relation to their masters of slaves *now living:* nor the question as to the right of abolishing slavery, in the sense in which this expression is used when it signifies the liberation of persons now held as slaves, from the operation of slave laws; while these laws are still left to act on other persons who may be hereafter reduced to slavery under them.

It is not denied that the powers given to the various departments of government are in general *limited* and defined; nor is it to be forgotten that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Const. Amendment, Art. X.) But the powers claimed for the President and for Congress, in this essay, are believed to be delegated to them respectively under the constitution, expressly or by necessary implication.

The learned reader will also notice, that the positions taken in this pamphlet do not depend upon the adoption of the most liberal construction of the constitution, Art. I. Sect. 8, Cl. 1, which is deemed by eminent statesmen to contain a distinct, substantive power to pass all laws which Congress shall judge expedient "*to provide for the common defence and general welfare.*" This construction was held to be the true one by many of the original framers of the constitution and their associates; among them was George Mason of Virginia, who opposed the adoption of the constitution in the Virginia convention, because, among other reasons, he considered that the true construction. (See Elliott's Debates, vol. ii. 327, 328.) Thomas Jefferson says, (Jefferson's Correspondence, vol. iv. p. 306,) that this doctrine was maintained by the *Federalists as a party*, while the opposite doctrine was maintained by the Republicans as a party. Yet it is true that several Federalists did not adopt that view, but Washington, Adams, Jefferson, Madison, Monroe, Hamilton, Mason, and others, were quite at variance as to the true interpretation of that much contested clause. Southern

statesmen, drifting towards the state-rights doctrines, as time passed on, have generally adopted the strictest construction of the language of that clause; but it has not yet been authoritatively construed by the Supreme Court. Whatever may be the extent or limitation of the power conveyed in this section, it is admitted by all that it contains the power of imposing taxes to an unlimited amount, and the right to appropriate the money so obtained to "the common defence and public welfare." Thus it is obvious, that the right to appropriate private property to public use, and to provide compensation therefor, as stated in Chapter I.; the power of Congress to confiscate enemy's property as a belligerent right; the power of the President, as commander-in-chief, as an act of war, to emancipate slaves; or the power of Congress to pass laws to aid the President, in executing his military duties, by abolishing slavery, or emancipating slaves, under Art. I. Sect. 8, Cl. 18, as *war measures*, essential to save the country from destruction, do not depend upon the construction given to the disputed clause above cited.

It will also be observed, that a distinction is pointed out in these pages between the legislative powers of Congress, in time of peace, and in time of war. Whenever the words "*the common defence*" are used, they are intended to refer to a time, not of constructive war, but of actual open hostility, which requires the nation to exert its naval and military powers in self-defence, to save the government and the country from destruction.

The Introduction, and Chapters I. and VIII., should be read in connection, as they relate to the same subject; and the reader will bear in mind that, in treating of the powers of Congress in the first chapter, it is not asserted that Congress have, *without any public necessity justifying it*, the right to appropriate private property of any kind to public use. There must always be a justifiable cause for the exercise of every delegated power of legislation.

It is not maintained in these pages that Congress, in time of peace, has the right to abolish slavery in the States, by passing

laws rendering the *holding of any slaves* therein illegal, so long as slavery is merely a household or family, or domestic institution; and so long as its existence and operation are confined to the States where it is found, and concern *exclusively* the domestic affairs of the Slave States; and so long as it does not conflict with or affect the rights, interests, duties, or obligations which appertain to the *affairs of the nation*, nor impede the execution of the laws and constitution of the United States, nor conflict with the rights of citizens under them. Yet cases might arise in which, in time of peace, the abolishment of slavery might be necessary, and therefore would be lawful, in order to enable Congress to carry into effect some of the express provisions of the constitution, as for example, that contained in Art. IV. Sect. 4, Cl. 1, in which the United States guarantee to every State in this Union a republican form of government; or that contained in Art. IV. Sect. 2, Cl. 1, which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

It is asserted in this essay that, when the institution of slavery no longer concerns only the household or family, and no longer continues to be a matter exclusively appertaining to the domestic affairs of the State in which it exists; when it becomes a potent, operative, and efficient instrument for carrying on war against the Union, and an important aid to the public enemy; when it opposes the national military powers now involved in a gigantic rebellion; when slavery has been developed into a vast, an overwhelming *war power*, which is actually used by armed traitors for the overthrow of government and of the constitution; when it has become the origin of civil war, and the means by which hostilities are maintained in the deadly struggle of the Union for its own existence; when a local institution is perverted so as to compel three millions of loyal colored subjects to become belligerent traitors because they are held as slaves of disloyal masters, — then indeed slavery has become an

affair most deeply affecting the national welfare and common defence, and has subjected itself to the severest enforcement of those legislative and military powers, to which alone, under the constitution, the people must look to save themselves from ruin. In the last extremity of our contest, the question must be decided whether slavery shall be rooted up and extirpated, or our beloved country be torn asunder and given up to our conquerors, our Union destroyed, and our people dishonored? Are any rights of property, or any claims, which one person can assume to have over another, by whatever local law they may be sanctioned, to be held, by any just construction of the constitution, as superior to the nation's right of self-defence? And can the local usage or law of any section of this country override and break down the obligation of the people to maintain and perpetuate their own government? Slavery is no longer local or domestic after it has become an engine of war. The country demands, at the hands of Congress and of the President, the exercise of every power they can lawfully put forth for its destruction, not as an *object* of the war, but as a *means* of terminating the rebellion, if by destroying slavery the republic may be saved. These considerations and others have led the author to the conclusion stated in the following pages, "that Congress has the right to abolish slavery, when in time of war its abolishment is necessary to aid the commander-in-chief in maintaining the '*common defence*.'"

W. W.